Mailed 3/14/2000

IN THE MATTER OF:	
	Case Nos: 1999-LHC-2535/2536
David D. Gualtieri Claimant	
	OWCP Nos: 1-135374 1-98369
Against	
General Dynamics Corporation Employer/Self-Insurer	
and	
Director, Office of Workers' Compensation Programs, United States Department of Labor Party-in-Interest	

APPEARANCES:

David N. Neusner, Esq.
For the Claimant

Lance G. Proctor, Esq.
For the Employer/Self-Insurer

Merle D. Hyman, Esq.
Senior Trial Attorney
For the Director

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on November 22, 1999, in New London, Connecticut, at which time all parties were given the opportunity to present evidence and oral arguments. Post-hearing briefs were not requested herein. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit and RX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	Item	Filing Date
CX 9	Attorney Neusner's letter filing the	12/08/99
CX 10	Medical bill of Dr. William J. Hostnik	12/08/99
CX 11	Medical bill of Dr. Anthony R. Barri	12/08/99
CX 12	The December 13, 1988 Informal Disfigurement Evaluation of Commissioner Robin Waller	12/08/99
CX 13	A portion of Claimant's personnel records	12/08/99
CX 14	Attorney Neusner's letter filing the	12/09/99
CX 15	November 6, 1999 deposition testimony of Paul Murgo, M.Ed. CRC,	12/09/99

The record was closed on December 9, 1999 as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. On October 25, 1995 Claimant suffered an injury in the course and scope of his employment.

4. Claimant gave the Employer notice of the injury in a timely manner.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

6. The parties attended an informal conference on July 13, 1999.

7. The applicable average weekly wage is $688.32.

8. The Employer voluntarily and without an award has paid temporary total compensation from October 26, 1995 through October 29, 1995 and from November 14, 1995 through the present and continuing.

The unresolved issues in this proceeding are:

1. The nature and extent of Claimant's disability.

2. The date of his maximum medical improvement.

3. The applicability of Section 8(f) of the Act.

Summary of the Evidence

David D. Gualtieri ("Claimant" herein), forty-six (46) years of age, with a high school education and an employment history of manual labor, began working on April 25, 1975 as a welder at the Groton, Connecticut shipyard of the Electric Boat Company, then a division of the General Dynamics Corporation (“Employer”), a maritime facility adjacent to the navigable waters of the Thames River where the Employer builds, repairs and overhauls submarines. Claimant left the shipyard on April 29, 1974 and went to work elsewhere. However, he returned to the Employer’s shipyard on December 15, 1976 in the same job classification. As a welder Claimant worked primarily in the nuclear reactor room and he had to climb up/down several levels of ladders to reach his work site while carrying his tool bag weighing approximately 60-70 pounds with his tools and supplies. He had to work in tight and confined spaces, often in awkward positions. He has experienced a number of shipyard accidents and the most pertinent of these will be summarized herein. (RX 15; TR 14-16, 19-22; CX 13)

Claimant was severely injured in an electrocution episode in 1977, sustaining damage to his left eye and the left side of his face. He was out of work for about six months and underwent a total of twelve (12) surgeries, one of which was a skin graft. To this day the left side of his face is numb, his tear ducts do not function and the left eye vision is always “blurred.” (TR 17-18; CX 9-CX 12)

Claimant injured his back while working on the 755 Boat and the Employer authorized treatment by Dr. Martin L. Karno, an orthopedic surgeon. (RX 5) Dr. Karno, who had previously examined Claimant on August 21, 1983 for a dislocated shoulder, treated Claimant over the years for “recurrent dislocation left shoulder” and, as of August 19, 1988, the doctor opined that Claimant’s August 28, 1987 injury had resulted in a fifteen (15%) permanent partial disability of the lumbo-sacral spine.” (RX 24; TR 22-25)

Claimant injured his back on March 11, 1988 in a shipyard accident and the Employer referred Claimant to Dr. William R. Cambridge, an orthopedist, and the doctor reports as follows in his May 3, 1989 letter to the Employer (RX 19):

> “As you have requested, I have reviewed all available medical records and radiographs and have conducted a history and physical examination on David Gualtieri.

> "This patient is a 36 year old male employed as a welder at General Dynamics for approximately 12 years. He has sustained two injuries at work. The first was an injury to his left shoulder which resulted in an anterior dislocation. He eventually underwent reconstruction. He was out of work approximately three years with the injury. He returned to work in 1984 on light duty and eventually to full duty. The patient did well until September 1987 when he was pulling some ventilation hoses. He states that he experienced some low back pain and pain radiating down the right anterior thigh. The patient remained out of work for approximately two months and returned to work in November 1987. The patient did well until on or about March 11, 1988 when he was picking up a metal cover when he had an exacerbation of low back pain. The patient remained out of work because of the strike but then went back to work. The patient presently takes Naprosyn for discomfort.
>
> "Radiographs of the lumbosacral spine merely suggest some slight decrease in disc space height. No significant arthritis or disc degeneration is seen. However, the patient has a grade one spondylolisthesis.
>
> "Impression: This patient has a grade one spondylolisthesis. This condition is entirely preexisting. However, it may be exacerbated by the type of work this patient does. In fact, this patient is at risk for developing future back problems that may indeed require surgery which would include discectomy and fusion. Right now the patient is doing pretty well.
>
> "In my opinion, the condition presently carries a permanent partial disability of 5%. If further back injuries at work occur, I would strongly recommend having this patient transferred to another department or a lighter duty work before a serious injury develops."

Claimant's medical records reflect that he also injured his back and hands and neck in shipyard accidents on December 25, 1992 (RX 4)(neurological problems), on January 9, 1995 (RX 3), on March 1, 1995 (RX 2) and finally on October 25, 1995. (RX 1) The Employer authorized appropriate medical treatment initially by Dr. Karno and then by Dr. Paonessa.

Dr. Paonessa continued to treat Claimant's low back and left shoulder problems as needed and the doctor's reports and progress notes are in evidence as RX 18, and I note that these reports begin on July 17, 1990 and end on May 11, 1998.

Dr. P.A. Stuart examined Claimant on May 18, 1995 and the doctor stated as follows in his report on May 18, 1995 (CX 7):

HISTORY: The patient has been treated by Dr. Paonessa for left shoulder discomfort thought to be the result of impingement syndrome. He had some temporary relief as a result of a subacromial injection. He is getting some temporary relief as a result of some ongoing Ultrasound.

The patient has had two injuries to the left upper extremity. He is right hand dominant. He had an electric shock type of injury that was transmitted through the left arm and apparently did damage to the left side of his face which was treated with plastic reconstructive surgery. There was never any attention directed to the arm as he recalls.

In 1986 he had a dislocation of his shoulder at work. This was reduced by a physician. Then over the course of a couple of months had 4-5 recurrences, but when he describes these, these appear to be subluxations and that they spontaneously reduced. He then underwent surgery by Dr. Carlow in New London. He felt that the shoulder was tighter after that but significantly weaker. He has never regained his strength or motion.

EXAM today just on inspection, he has a well healed surgical scar, but significant deltoid atrophy of the entire deltoid both anteriorly, laterally, and posteriorly. He is able to generate about 70-80○ of elevation in abduction and forward flexion plane. Internal rotation is to about the waist and external rotation is about 45○. He has pain and weakness with resisted external rotation. Resisted internal rotation is less painful and stronger.

The patient had repeat shoulder films today. There is no metal in place. There does not appear to be any significant degenerative disease.

Based on the deltoid atrophy, I think it is best at this point to proceed with an EMG to see whether there is any neurologic reason that he should have such significant deltoid atrophy. He did not have an incision that went through the deltoid muscle. The previous surgery incision is in the deltal pectoral groove, so this does not appear to be a problem with any type of reattachment of deltoid after his last surgery. It also atrophied posteriorly, so I question whether he has a nerve root or nerve injury as the cause of this.

This significantly affects his shoulder mechanics. We will get an MRI to look at the underlying aspect of the shoulder. This would include the rotator cuff tendons, the joint surfaces and the glenoids to see whether any

anatomic abnormality can be documented there. He will continue P.T. (physical therapy) since this appear to be giving him symptomatic relief. Return after testing.

Dr. Paonessa sent the following letter to the Employer's workers' compensation adjuster on April 10, 1995 (RX 18):

> This is to respond to your letter of March 7, 1995, concerning Mr. David Gualtieri. Mr. Gualtieri was seen by me on January 11, 1995. At that time he reported that he had had a prior injury to his shoulder approximately 1979 when he was injured at the same employment at Electric Boat and had had a dislocated left shoulder which ultimately became a chronic dislocation and was operated on by Dr. Karno in New London. He had done well with this, but stated that he had started to have pain the week prior to my seeing him and that he had reported this to the yard hospital on January 9, 1995.
>
> Therefore, I believe that his current problem is related to this date of injury of January 1995, but that he did have pre-existing left shoulder problems from a prior work related injury, according to the doctor.

Dr. Thomas Cherry, a hand specialist, examined Claimant on May 22, 1997 "for a second opinion" and the doctor states as follows (RX 20):

> He is employed at Electric Boat as a welder. He presents with chief complaint of numbness in his right hand. The little, ring and middle fingers are most involved. Elbow flexed activities make his symptoms worse. He has tenderness with pressure over the elbow. He also notes about a five to six year history of weakness in the flexion of his thumb. This improved somewhat from its original condition but is not resolved completely.
>
> He has had multiple electrical diagnostic studies. His most recent study of March, 1997 showed bilateral ulnar neuropathy at the elbow felt to be moderate in severity. No anterior interosseious nerve syndrome could be found. Evidently needle inspection of the flexor pollicis longus was accomplished without evidence of denervation.
>
> Upon questioning today, the patient feels he can live with the condition of his thumb. He is most concerned about the pain along the ulnar aspect of the forearm and arm.
>
> EXAMINATION: On examination, there is marked tenderness over the cubital tunnel on the right side. With elbow flexion, his symptomatology of pain radiating down the

> medial arm, forearm and into the little and ring fingers is reproduced. Distally, there is decreased touch sensation in the little digit compared to the middle digit. There is weakness of the flexor pollicis longus in flexion. There does appear to be a tenodesis present and the flexor pollicis longus appears to be palpable. There is no obvious atrophy of his intrinsic musculature. His nerve test did not investigate the adductor digiti equinti with needle examination so this has not been verified.
>
> IMPRESSION: Cubital tunnel syndrome, right arm. The patient is markedly symptomatic from this condition and has not responded well to conservative treatment. I would recommend that approval be given for anterior transposition with ulnar nerve neurolysis at the right elbow.
>
> Because of the long standing weakness in the flexor pollicis longus, flexion and the fact that the patient does not feel that this is markedly symptomatic, I would not personally be in favor of exploring the anterior interosseous nerve at this time, according to the doctor.

On July 18, 1997 Claimant underwent ulnar transposition of the right elbow and Dr. Paonessa opined that Claimant also required a left ulnar transposition and a lateral epicondylar repair-release, and the doctor requested that the Employer authorize those procedures. (RX 18)

Claimant's shipyard work for twenty (20) years has also caused bilateral knee problems and these are summed up in Dr. Cambridge's April 30, 1998 report (RX 19):

> The patient is making good progress in physical therapy. He states that he feels a bit better than he did before surgery. He still lacks significant strength flexing his shoulder. He does have marked atrophy of the anterior deltoid.
>
> The plan at this point is to continue his physical therapy for rehabilitation. It should be pointed out that this patient had a shoulder dislocation that has not been addressed to this point although I do not feel at this point the patient is a candidate for any surgical intervention for this problem.
>
> The patient is also complaining of intermittent pain, swelling and frequent instability involving the right knee. Unfortunately, his right knee shows evidence of moderately severe tricompartmental degenerative arthritis. The joint line remains open a bit. The

patient is 45 years old. The patient seems to be rapidly becoming a candidate for total knee replacement. However his age is a concern. I told the patient in no uncertain terms that we could arthoscope the knee and deal with cartilage tears that may be causing his frequent instability but the surgery has a 50/50 chance for improvement.

According to Dr. Cambridge on January 13, 1999, the patient's left shoulder is a concern. He has continued clicking, popping and episodes of instability and frankly he cannot use the shoulder. This has been discussed all along. The patient would probably respond to an anterior capsulorrhaphy. He wishes to schedule surgery for May. (RX 19).

According to Dr. Paonessa's progress note of January 25, 1999 (CX 2):

"David returns and has had a successful right total knee replacement since he was last seen here in July. Unfortunately, his left shoulder problems persist and his left shoulder remains the most painful problem that he has.

"The ulnar transposition at the medial elbow is still slightly sensitive at the transposed segment but this is much less symptomatic than his shoulder and ulnar symptoms while still present are not debilitating or severe and I would not consider re-exploration at this level. The lateral epicondyle site has done well save for the previously noted Ethlbond suture that is palpable through the skin. This is occasionally quite sore and appears to be directly related to the suture knot. I have talked with him previously about removing this with a local anesthesia. However, as he will be undergoing another procedure on his shoulder, we discussed possibly having this done by Dr. Cambridge at that time. David is willing to do this and I will ask Dr. Cambridge if he is willing to do this. If this would be inadvisable, then David will call back here and we will set up a time to do this with a local anesthesia either before or after his shoulder surgery which is scheduled as I understand it for May of this year," according to the doctor.

Dr. Cambridge issued the following report on October 28, 1997 (CX 3):

This 44 year old male has been employed as a welder at General Dynamics for approximately 21 years. He has had multiple small injuries to the right knee. He states that he has approximately five to six reports of right knee injuries that were made to the hospital over that

period of time. The patient is presently 44 years old. He states he had knee surgery done as a child. He states that they removed the meniscus. (TR 25-26)

On physical examination the patient has a mild varus attitude to the right knee compared to the left. He has a full ROM. Tenderness along the medial and lateral joint line. A little laxity of the ACL with a good end point. Otherwise the knee exam is unremarkable.

Radiographs reveal frank degenerative arthritis.

Impression: This patient has had multiple work related injuries while working at General Dynamics over a period of 21 years. Also had a childhood injury that resulted in formal arthrotomy and medial meniscectomy. The patient had reported a more recent onset following multiple small injuries at General Dynamics over a period of 21 years of intermittent instability of his knee. He describes episodes of his knee just giving right out on him.

It is my impression that the patient has obvious degenerative arthritis of the knee. He is 44 years old and every effort should be made to help salvage the knee and avoid joint replacement surgery. His present symptoms seem to indicate a mechanical derangement so the most obvious reasonable choice would be an arthroscopic evaluation to remove either loose bodies or a lateral meniscus tear or remnant tear of the medial meniscus.

It is my opinion, based on a reasonable degree of medical probability, that the present problem with his knee is causally related to the work and injuries at General Dynamics. For the present we will treat him with Motrin.

Dr. Paonessa sent the following letter to Claimant’s attorney on November 11, 1997 (CX 2):

I recently saw Mr. David Gualtieri as a follow-up in our office following his work related injuries. At this point I fell that Mr. Gualtieri has reached maximal medical improvement from his work injuries that led to him developing a spondylolisthesis at L5-S1 with the degenerative L4-5 disc and he has undergone an L4-S1 fusion with decompression. Unfortunately he has what appears to be chronic radiculitis still down the right leg.

At this point, I feel that David has suffered a 25% permanent partial disability of his lumbar spine due to the resultant weakness to the right lower leg and the

> limitations to his right leg. This would be obtained by reviewing the AMA "**Guidelines**" 4th Edition for DRE lumbosacral Category 5 of radiculopathy and loss of motion segment integrity. I feel that it is possible that Mr. Gualtieri may at one point elect to undergo removal of his spinal instrumentation since this may be partially causing some of his continued pain. At this point he does not wish to desire this in the near future and, therefore, I feel that the rating could go forth, but possibly would be left open in case further surgery was at any point done.

Claimant leads a mostly sedentary life as any physical exertion aggravates and exacerbates his multiple medical problems. While he was able to return to work at the shipyard on October 30, 1995, he had to stop working on November 14, 1995 because he no longer could work as a welder. He would like to return to work but there is no work at the shipyard that he can perform. He experiences daily back, shoulder, bilateral hand and knee pain; he has difficulty sleeping and cold, damp weather also exacerbates his multiple medical problems. (TR 26-40)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24

BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita**, **supra**. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier**, **supra**. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes,**

supra; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his chronic lumbar disc syndrome, resulted from working conditions at the Employer's shipyard. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszicwicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves

and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

This closed record conclusively establishes, and I so find and conclude, that Claimant injured his back in a relatively minor accident on October 25, 1995, that the Employer had timely notice thereof, authorized appropriate medical care and treatment and paid appropriate compensation benefits while he was unable to return to work and that Claimant timely filed for benefits once a dispute arose between the parties. In fact, the crucial issue is the nature and extent of Claimant’s disability, an issue I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc.**

v. Salzano, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternate employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Claimant has established that he cannot return to work as a welder. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976). **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit any evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). Moreover, Paul F. Murgo, M. Ed., CRC, CDMS, a vocational rehabilitation counselor, has opined that Claimant is unemployable because of his multiple medical problems, his limited transferrable skills and his limited residual work capacity. Mr. Murgo reiterated his opinions at his November 16, 1999 deposition. (CX 1, CX 15) I therefore find Claimant has a total disability.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988);

Eckley v. Fibrex and Shipping Company, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or

if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

On the basis of the totality of the record, I find and conclude that Claimant reached maximum medical improvement on November 17, 1997 and that he has permanently and totally disabled from November 18, 1997, according to the well-reasoned opinion of Dr. Paonessa. (CX 2, CX 5)

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by

the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer has accepted the claim, provided the necessary medical care and treatment and voluntarily paid compensation benefits from the day of the accident to the present time and continuing, except for that short period of time he was able to return to work. (TR 6-7) **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Section 8(f) of the Act

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **FMC Corporation v. Director, OWCP**, 886 F.2d 118523 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. **See Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983);

Kooley v. Marine Industries Northwest, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." **Dillingham Corp. v. Massey**, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989), **rev'd and remanded on other grounds sub nom. Director v. Berkstresser, 921 F.2d 306 (D.C. Cir. 1990)**; **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (19982), **aff'd**, 718 F.2d 644 (4th Cir. 1983). **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. **Eymard & Sons Shipyard v. Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berkstresser**, **supra**, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport News Shipbuilding and Dry Dock Co.**, 16 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone**, **supra**.

The pre-existing permanent partial disability need not be economically disabling. **Director, OWCP v. Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), **cert. denied**, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2D 602 (3d Cir. 1976).

Section 8(f) relief is not applicable where the permanent total disability is due solely to the second injury. In this regard, **see Director, OWCP (Bergeron) v. General Dynamics Corp.**, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992); **Luccitelli v. General Dynamics Corp.**, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); **CNA Insurance Company v. Legrow**, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991) In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit, in whose jurisdiction the instant case arises, has specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have cause claimant's permanent total disability is not satisfied merely by

showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. **See Director, OWCP v. General Dynamics Corp. (Bergeron), supra.**

On the basis of the totality of the record, I find and conclude that the Employer has satisfied these requirements. The record reflects (1) that Claimant has worked for the Employer from April 25, 1973 through April 27, 1974 and since December 15, 1975 (CX 13), (2) that he was seriously injured in an electric shock episode in 1977, (3) that he still experiences residuals of that injury in the form of blurred vision and left side of the face numbness, (4) that he has experienced left shoulder problems since August 21, 1983 (RX 24), (5) that he injured his back on August 28, 1987 while working on the 755 Boat (RX 5), (6) that he suffered a neurological/pulmonary injury on December 25, 1992 when he was exposed to and inhaled chemical fumes (RX 4), (7) that he injured his neck and shoulder on January 9, 1995 while working on the 21 Boat (RX 3), (8) that his bilateral carpal tunnel syndrome was diagnosed on or about March 1, 1995. (RX 2), (9) that the Employer authorized appropriate medical care and treatment for these injuries, (10) that the Employer retained Claimant as a valued employee even with actual knowledge of his multiple medical problems, (11) that he has sustained previous work-related industrial accidents prior to October 25, 1995, (12) while working at the Employer's shipyard and (13) that Claimant's permanent total disability is the result of the combination of his pre-existing permanent partial disability (**i.e.**, his above identified medical problems) and his October 25, 1995 injury as such pre-existing disability, in combination with the subsequent work injury, has contributed to a greater degree of permanent disability, according to Dr. Willetts (RX 17), Dr. Paonessa (RX 18), Dr. Cambridge (RX 19), Dr. Goodman (RX 22), Dr. Giacchetto (RX 23) and Mr. Murgo. (CX 1, CX 15). **See Atlantic & Gulf Stevedores v. Director**, OWCP, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989).

Claimant's condition, prior to his final accident on October 25, 1995, was the classic condition of a high-risk employee whom a cautious employer would neither have hired nor rehired nor retained in employment due to the increased likelihood that such an employee would sustain another occupational injury. **C & P Telephone Company v. Director, OWCP**, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977), **rev'g in part**, 4 BRBS 23 (1976); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Hallford v. Ingalls Shipbuilding**, 15 BRBS 112 (1982).

Even in cases where Section 8(f) is applicable, the Special Fund is not liable for medical benefits. **Barclift v. Newport News Shipbuilding & Dry Dock Co.**, 15 BRBS 418 (1983), **rev'd on other grounds sub nom. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.**, 737 F.2d 1295 (4th Cir. 1984); **Scott v. Rowe Machine**

Works, 9 BRBS 198 (1978); **Spencer v. Bethlehem Steel Corp.**, 7 BRBS 675 (1978).

The Board has held that an employer is entitled to interest, payable by the Special Fund, on monies paid in excess of its liability under Section 8(f). **Campbell v. Lykes Brothers Steamship Co., Inc.**, 15 BRBS 380 (1983); **Lewis v. American Marine Corp.**, 13 BRBS 637 (1981).

In **Huneycutt v. Newport News Shipbuilding & Dry Dock Co.**, 17 BRBS 142 (1985), the Board held that where permanent partial disability is followed by permanent total disability and Section 8(f) is applicable to both periods of disability, employer is liable for only one period of 104 weeks. In **Huneycutt**, the claimant was permanently partially disabled due to asbestosis and then became permanently totally disabled due to the same asbestosis condition, which had been further aggravated and had worsened. Thus, in **Davenport v. Apex Decorating Co.**, 18 BRBS 194 (1986), the Board applied **Huneycutt** to a case involving permanent partial disability for a hip problem arising out of a 1971 injury and a subsequent permanent total disability for the same 1971 injury. **See also Hickman v. Universal Maritime Service Corp.**, 22 BRBS 212 (1989); **Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78 (1989); **Henry v. George Hyman Construction Company**, 21 BRBS 329 (1988); **Bingham v. General Dynamics Corp.**, 20 BRBS 198 (1988); **Sawyer v. Newport News Shipbuilding and Dry Dock Co.**, 15 BRBS 270 (1982); **Graziano v. General Dynamics Corp.**, 14 BRBS 950 (1982) (where the Board held that where a total permanent disability is found to be compensable under Section 8(a), with the employer's liability limited by Section 8(f) to 104 weeks of compensation, the employer will not be liable for an additional 104 weeks of death benefits pursuant to Section 9 where the death is related to the injury compensated under Section 8 as both claims arose from the same injury which, in combination with a pre-existing disability resulted in total disability and death); **Cabe v. Newport News Shipbuilding and Dry Dock Co.**, 13 BRBS 1029 (1981); **Adams**, **supra**.

However, the Board did not apply **Huneycutt** in **Cooper v. Newport News Shipbuilding & Dry Dock Co.**, 18 BRBS 284, 286 (1986), where claimant's permanent partial disability award was for asbestosis and his subsequent permanent total disability award was precipitated by a totally new injury, a back injury, which was unrelated to the occupational disease. While it is consistent with the Act to assess employer for only one 104 week period of liability for all disabilities arising out of the same injury or occupational disease, employer's liability should not be so limited when the subsequent total disability is caused by a new distinct traumatic injury. In such a case, a new claim for a new injury must be filed and new periods should be assessed under the specific language of Section 8(f). **Cooper**, **supra**, at 286.

However, employer's liability is not limited pursuant to Section 8(f) where claimant's disability did not result from the combination or coalescence of a prior injury with a subsequent one. **Two "R" Drilling Co. v. Director, OWCP**, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); **Duncanson-Harrelson Company v. Director, OWCP and Hed and Hatchett**, 644 F.2d 827 (9th Cir. 1981). Moreover, the employer has the burden of proving that the three requirements of the Act have been satisfied. **Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982). Mere existence of a prior injury does not, **ipso facto**, establish a pre-existing disability for purposes of Section 8(f). **American Shipbuilding v. Director, OWCP**, 865 F.2d 727, 22 BRBS 15 (CRT) (6th Cir. 1989). Furthermore, the phrase "existing permanent partial disability" of Section 8(f) was not intended to include habits which have a medical connection, such as a bad diet, lack of exercise, drinking (but not to the level of alcoholism) or smoking. **Sacchetti v. General Dynamics Corp.**, 14 BRBS 29, 35 (1981); **aff'd**, 681 F.2d 37 (1st Cir. 1982). Thus, there must be some pre-existing physical or mental impairment, **viz**, a defect in the human frame, such as alcoholism, diabetes mellitus, labile hypertension, cardiac arrhythmia, anxiety neurosis or bronchial problems. **Director, OWCP v. Pepco**, 607 F.2d 1378 (D.C. Cir. 1979), **aff'g**, 6 BRBS 527 (1977); **Atlantic & Gulf Stevedores, Inc. v. Director, OWCP**, 542 F.2d 602 (3d Cir. 1976); **Parent v. Duluth Missabe & Iron Range Railway Co.**, 7 BRBS 41 (1977). As was succinctly stated by the First Circuit Court of Appeals, ". . . smoking cannot become a qualifying disability [for purposes of Section 8(f)] until it results in medically cognizable symptoms that physically impair the employee. **Sacchetti**, **supra**, at 681 F.2d 37.

As found above, the Employer has satisfied the tri-partite requirements for Section 8(f) relief.

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer as a self-insurer. Claimant's attorney shall file a fee application concerning services rendered and costs incurred in representing Claimant after July 13, 1999, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration. The fee petition shall be filed with our Docket Clerk within thirty (30) days of receipt of this decision and Employer’s counsel shall have ten (10) days to comment thereon.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer as a self-insurer shall pay to the Claimant compensation for his temporary total disability from October 26, 1995 through October 29, 1995, and from November 14, 1995 through November 17, 1997, based upon an average weekly wage of $688.32, such compensation to be computed in accordance with Section 8(b) of the Act.

2. Commencing on November 18, 1997, and continuing thereafter for 104 weeks, the Employer shall pay to the Claimant compensation benefits for his permanent total disability, plus the applicable annual adjustments provided in Section 10 of the Act, based upon an average weekly wage of $688.32, such compensation to be computed in accordance with Section 8(a) of the Act.

3. After the cessation of payments by the Employer, continuing benefits shall be paid, pursuant to Section 8(f) of the Act, from the Special Fund established in Section 44 of the Act until further Order.

4. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his October 25, 1995 injury. The Employer shall also receive a refund, with appropriate interest, of any overpayment of compensation made to Claimant herein.

5. Interest shall be paid by the Employer and Special Fund on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

6. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, even after the time period specified in the second Order provision above, subject to the provisions of Section 7 of the Act.

7. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel who shall then have ten (10) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference on July 13, 1999.

DAVID W. DI NARDI
Administrative Law Judge

Dated:
Boston, Massachusetts
DWD:las